United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6050

U.S. COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ARTHUR N. ECONOMOU, ET AL., :

PLAINTIFFS, :

-AGAINST- :

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., :

DEFENDANTS. :

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BRIEF

Index No. 75-6050

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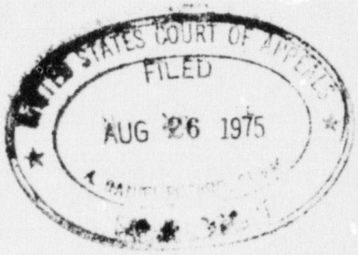

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U.S COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARTHUR N. ECONOMOU, et al., Plaintiffs, -against- UNITED STATES DEPARTMENT OF AGRICULTURE, et al., Defendants.	BRIEF Index No. 75-6050

I. PRELIMINARY STATEMENT

This action was commenced in early 1972. While the complaint has been amended, neither the defendants nor the facts have changed except in-so-far as a decision of the United States Court of Appeals, Second Circuit, has shown the plaintiffs to have been wrongfully subject to certain administrative proceedings and orders of certain of the defendants to this action. (Arthur N. Economou and Arthur N. Economou & Co., Inc. v. United States Department of Agriculture Docket Number 73-1221, 759 F. 2d 2415). Written interrogatories were served upon the defendants on March 20, 1975, which never even answered. At a very late date, namely on March 20, 1975, this matter pending for more than three years, and at a time when this action was moving toward trial, the defendants moved to dismiss this action because they now claim it is barred by the doctrine of official and sovereign immunity. This belated motion by the defendants who had three years to take such action, the plaintiffs will allege, is not timely. Rule 12(b) of the Federal Rules of Civil Procedure does not contemplate such a motion being made at this late date as shall be discussed below. Nor were numerous essential facts ascertained at this preliminary stage of these proceedings. Nevertheless, on

May 22, 1975, the District Court in a Memorandum Opinion (hereinafter "Opinion"), Exhibit "A", dismissed this action.

II FACTS

1. Plaintiffs, The American Board of Trade, Inc. (hereinafter "ABT"), and Arthur N. Economou & Co., Inc. (hereinafter "ANE Inc.") are corporations incorporated under the laws of the State of Delaware and having their principal office and place of business at 286 Fifth Avenue, New York, New York. Plaintiff Arthur N. Economou (hereinafter "ANE") is an individual resident of New York, with resident address at 115 E. 87th Street, New York, New York.

2. Defendants are the United States Government, it's agencies, and employees thereof, some of whom are investigative or law enforcement officers thereof, who, the plaintiffs alleged, acting in their ministerial capacity, did conspire to interfere with and violate, and did interfere with and violate, plaintiffs' rights and privileges, and did deprive plaintiffs of their property without due process of law, as more fully appears hereinbelow.

3. Defendants, Department of Agriculture, acting through the defendant Commodity Exchange Authority and officers thereof, instituted proceedings against plaintiffs ANE and ANE Inc. on February 19, 1970, and June 22, 1970, alleging that, as of certain dates, in 1969 and 1970, ANE Inc. failed to meet certain requirements applicable to "futures commission merchants" registered under the Commodity Exchange Act. Some time before the issuance of the February complaint, plaintiffs ANE and ANE Inc. had ceased to engage in activities regulated by defendants, and several weeks prior to such complaint, defendants had confirmed that ANE Inc., then a registrant, was in conformity with all legal requirements. Defendants issued the

June 22 amended complaint against ANE and ANE Inc. at a time when, in accordance with federal law, they were no longer subject to regulation by defendants in respect to the acts which they complained. Defendants issued each of the complaints without the notice or warning required by federal law.

4. Prior to the issuance of defendants' illegal complaints and throughout their improper proceedings against ANE and ANE Inc., plaintiffs and their affiliates were sharply critical of the staff and operations of defendants and carried on vociferous campaign for the reform of defendant Commodity Exchange Authority to obtain more effective regulation of commodity trading.

5. Defendants furnished the complaints to interested persons and others without furnishing plaintiffs' ANE and ANE Inc. answers as well, and the New York office of the defendant CEA failed to include such answers and other papers in the record in its file made available to the public.

6. Following the issuance of the amended complaint, defendants issued a deceptive press release that falsely indicated to the public that plaintiffs ANE and ANE Inc. financial resources had deteriorated, when defendants knew that their statement was untrue and so acknowledged previously that said assertion was untrue.

7. On January 8, 1973, defendant Donald A. Campbell issued a final Decision and Order adopting verbatim the sanctions recommended by defendant Bain and the complainants in the original action against the plaintiffs herein. Though plaintiffs had not for some years either been registered as futures commission merchants or otherwise subject to defendants' regulatory authority, defendants suspended ANE Inc.'s "registration", required ANE and ANE Inc. to cease and desist from violating requirements applicable only to registrants

and denied them trading privileges on contract markets for 90 days.

8. In the petition for review of defendants' Decision and Order brought by ANE and ANE Inc., Arthur N. Economou and Arthur N. Economou & Co., Inc. v. U.S. Department of Agriculture, Docket Number 73-1221 759 F. 2d 2415 (Second Circuit, 1974) the Circuit Court of Appeals set aside defendants' Decision and Order and dismissed their proceedings against ANE and ANE Inc. with prejudice, holding that the prosecution of the complaints was unlawful under federal law.

III. ISSUES

1. Has a timely motion to dismiss been made; and

2. Are the defendants so clearly immune from suit under the doctrine of sovereign immunity and official immunity that this case should be dismissed prior to discovery or trial.

IV. ANSWER

It is respectfully submitted that the motion to dismiss is not timely and that the doctrine of official and sovereign immunity are not applicable to this case and in any event were invoked prematurely.

V. LEGAL ARGUMENT

1. Defendants' Motion to Dismiss is Neither Timely Nor Proper

To permit a motion to dismiss for sovereign and official immunity in May, 1975 in an action that has been pending since February, 1972 would seem to be an abuse of judicial discretion. As a minimum, the defendants are guilty of laches. In addition, the defendants have never even bothered to reply to Interrogatories served upon them. The defendant has already served an Answer (in fact, more than one Answer) and as stated in Moore's Federal Practice Rules Pamphlet (2nd ed. reprinted 1974) p. 434:

> However, if a defendant proceeds first on the merits, as ... by answer on the merits, and thereafter attempts to challenge jurisdiction over his person... the challenge should fail; it comes too late and has not been made in the manner prescribed in Rule 12...
> Stavang v. American Potash and Chemical Corp. (CA 5th, 1965) 344 F. 2d 117.

Therefore, in addition to the dilatory nature of this motion, namely the period of time that has passed since the commencement of this action, it would seem that once the defendant has submitted an Answer, as in this case, the defendant can no longer attack the jurisdiction of the court. The assertion of sovereign and governmental immunity may be construed as nothing more nor less than an assertion that the court lacks jurisdiction over the defendants.

Note also that one of the crucial questions to be determined in assessing liability of government officials is the scope and type of activity the various defendants were engaged in. The Interrogatories here are designed as a first step in making that determination. As shall be discussed below a defendant acting in a ministerial capacity is more likely to be liable for certain tortious conduct than one in a policy making area. These matters can only be determined by further proceedings and may even have to await trial. See Fraley v. Chesapeake & Ohio R.R. (CA 3d 1968) 397 F.2d.

Furthermore, Rule 7(b)(1) of the Federal Rules of Civil Procedure require that a motion to dismiss must "... state with particularity the grounds therefor." Can it be said that the defendants' one page motion (Exhibit "B"), claiming blanket immunity irrespective of the position, role or action of the individual, in fact states with sufficient particularity grounds to dismiss this action? The plaintiffs respectfully assert that such is not the case.

2. The Court Below Improperty Dismissed Numerous Claims Without Opinion

The Opinion (Exhibit "A") page 3 of the District Court below telescoped the allegations of the plaintiffs in this case into three,

namely:

(1) The decision to initiate disciplinary proceedings against the plaintiffs without a warning letter;

(2) Defendants' decision to continue disciplinary proceedings against the plaintiffs though plaintiffs were no longer subject to the jurisdiction of the defendants; and

(3) Defendants issuance of inaccurate press releases.

In fact however, the Complaint (Exhibit "C") in this action is far broader than the Opinion indicates. The Opinion ignores all or part of the following allegations and others alleged by the plaintiffs:

(1) Defendants did interfere with and violate the plaintiffs constitutional rights and privileges and took their property without due process of law (Paragraph 4 of the Complaint).

(2) Defendants proceeded against plaintiffs ANE and ANE Inc. after they left the jurisdiction of the defendants, not merely when they were in the process of leaving the jurisdiction (Paragraph 5 of the Complaint.)

(3) Defendants acted in part to chill the speech of the plaintiffs (Paragraph 6 etc. of the Complaint).

(4) The sanctions imposed by the defendants against the plaintiffs, ANE and ANE Inc. were inappropraite and illegal since to suspend someone from registration, who is not registered, is a gratuity the law does not permit (Paragraph 9 of the Complaint).

(5) Press releases issued by the defendants were not only inaccurate but knowingly inaccurate and maliciously and unlawfully issued (Paragraphs 7 and 8 etc. of the Complaint).

(6) Defendants furnished false and incomplete information to the public and did so knowingly, about plaintiffs to this action (paragraph 7 etc. of the Complaint).

(7) Defendants acted in excess of their lawful authority (Paragraph 14 of the Complaint).

(8) Malice, lack of capacity, acts outside the jurisdiction are all alleged by the plaintiffs (Paragraphs 21, 22, etc. of the Complaint).

(9) Trespass interference with the right of privacy, malicious prosecution and abuse of process are all alleged in the Complaint.

In summation, the Opinion's delineation of the facts and claims alleged by the plaintiffs falls far short of the actual facts and claims set forth in the Complaint. It is respectfully submitted that the Opinion below, not having dealt with even a substantial portion of the plaintiffs' allegations is inadequate as a matter of fact and law.

3. The Timeliness of the District Court's Opinion

The District Court in its Opinion held that the individual defendants were immune from suit for the following reasons:

> "Moreover, plaintiffs admit in their second amended complaint that defendants' acts were connected with their duties under the Act. We conclude, therefore, that the individual defendants' acts were well within the scope of their authority." (Exhibit "A" page 3).

(i) The plaintiff never admitted that the defendants' acts were connected with their duties. In fact, the plaintiff clearly alleged in the Complaint that certain acts of the defendants were outside the scope of their duties. (See paragraph 15 of the Complaint which alleges defendants were "... in excess of their discretionary powers...," paragraph 16 which alleges "... unauthorized actions outside their discretionary functions and duties..." by the defendants; paragraph 17 alleging "The defendants, in excess of their regulatory authority and their discretionary functions

and powers...; paragraph 18 alleging "... aforesaid unauthorized and illegal activities...;"paragraph 19 alleging "Defendants exceeded their authority...;" paragraph 21 alleging Defendants "... did act outside the scope of their authority...; and paragraph 22 alleging defendants "... did act outside the scope of their authority.")

It is respectfully submitted that this error alone is sufficient grounds for reversal of the decision below.

(ii) The Opinion of the Court below stating that: "... the individual defendants' acts were well within the scope of their authority," is based upon the false premise that "... plaintiffs admit ... that defendants' acts were connected with their duties under the Act." (Opinion page 3). The plaintiffs respectfully argue that this alone is sufficient grounds to reverse the decision of the District Court.

(iii) The Opinion, page 3, further states that now that "... defendants have established that their acts were authorized, they can qualify for official immunity by showing the acts involved the exercise of discretion." Thereafter the Opinion examines the actions of the defendants and states:

> "The undisputed facts are that the Secretary of Agriculture, after examining a Commodity Exchange Authority audit of ANE, Inc. exercised his judgment and concluded that the plaintiffs had willfully violated the Act. He, therefore, took immediate action against plaintiffs without first issuing a warning letter."

Again the Court below states what the "undisputed facts" are when indeed these facts are in serious dispute. The court goes on in the Opinion below to assert that the defendants merely acted as prosecutors, releasers of news and interpreters of the act, all of which is discretionary and thereby making all defendants immune from suit.

The reality is that the Court had no facts at all to make such a decision. Even the plaintiff is not at all certain which defendants performed which functions. The facts allegedly undisputed by the Court are indeed disputed. The Court below had no right to substitute its decision on the facts for an actual trial of the issues in this case.

(iv) The "discretionary function"exception from liability is merely available as a defense and must be proved in each specific case. Neher v. U.S. (D.C. Minn. 1967) 265 F. Supp. 210. See also Scheuer v Rhodes 416 U.S. 322 (1974) at p. 243 holding, with regard to state officials, that "... the scope of immunity will necessarily be related to facts as yet not established by affidavits, admissions on trial record. Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 USC Sec 1983." The court further held at p. 250:

> "The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly the complaints place directly in issue whether the lesser officers and enlisted personnel of the Guard acted in good-faith obedience to the orders of their superiors. Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint."

Similarly the Superior Court has held with regard to federal officials in Doe et al. v McMillan 412 U.S. 304 (1972) at p. 320: "The scope of immunity has always been tied to the scope of... authority." Thus, the scope of immunity, if any, must be determined at trial, after full discovery, and cannot be determined at this stage of the proceedings.

4. The Actual Scope of Immunity

The Opinion below not only prematurely determines the question of immunity but also characterizes the scope of immunity available to federal officials with much too broad and sweep.

(a) Barr v Matteo and Press Releases

Barr v. Matteo 360 U.S. 564 (1959) is cited by the Opinion below, (see notes 3, 5, and 10 of Opinion). Does Barr v Matteo bar the plaintiffs from suit as the Opinion asserts? An examination of that case would seem appropriate.

In the first place, Barr v Matteo was a libel action, and in fact a libel action against a government official. This suit at bar is not a libel action; there is no assertion of libel, and in fact, not even slander has been professed by the plaintiffs as a cause of action in this case at bar.

The opinion of the court in Barr v Matteo was by four justices who joined in M.. Justice Harlan's opinion, a concurring opinion was rendered by Mr. Justice Black, and four dissenting opinions were written.

The defendant, Rent Stabilization Director, had issued a press release about his intent to dismiss certain subordinate employees because of policies they had been involved in, which were severely criticized by Congress.

In the four judge opinion of the court in Barr v Matteo 360 U.S. 564 (1959), the court held that the principle of the "... law of privileges as a defense by officers of the government to civil damage suits for

defamation and kindred torts..." (p. 569), cannot "... properly be restricted to executive officers of cabinet rank...." (p. 572)

The court went on to say on p. 573:

> "To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted - the relation of the act complainted of to "matters committed by law to his control or supervision..." "

Therefore the court held that though the question was a "close one" within the scope of this particular high ranking officer's authority under the circumstances of that case, that individual, Barr, was immune to suit for libel. In other words, the head of a federal agency is immune under these special facts for libel. The court clearly did not state that all federal officers are immune under all circumstances from libel suits. This case at bar is not a libel action and is not in the nature of one employee suing a superior employee involving a major political contest. The Barr v Matteo case did not even hold that the executive head of the federal department would be immune from libel suits under all circumstances.

(b) Doe v McMillan and Press Releases

In a more recent case, which the Court's Opinion fails to cite namely Doe et al. v McMillan 412 U.S. 306 (1972) the court, in deciding the matter stated as follows, pp. 319 and 320:

> Also, the Court determined in Barr that the scope of immunity from defamation suits should be determined by the relationship of the publication complained of to the duties entrusted to the officer. Barr v Matteo, supra, at 573-574; see also the companion case, Howard v Lyons, 360 U.S. 593, 597-598 (1959)

What is significant here is that the United States Supreme Court in 1972 has clearly and unequivocally stated that Barr v Matteo does not grant absolute immunity to public officials for press releases. Therefore, the fundamental contention of the Opinion that Barr v Matteo gives government officials absoulte immunity, is patently, clearly, and unequivocally mistaken.

The Doe v McMillan case, a 1972 decision of the Supreme Court, dealt with the question of both Congressional and executive immunity. The immunity discussed in that case is provided for by the United States Constitution Art. I Sec. 6 which provides in part: " [A]nd for any speech or debate in the House [Senators and Representatives] shall not be questioned in any other place."

Mr. Justice White, who delivered the opinion of the Court, clearly recognized the limitations of the immunity doctrine even when United States Congressmen are involved and when the immunity is provided for in the United States Constitution.

The Doe case involved a Congressional Committee investigation pursuant to Congressional authority and a report that was submitted by said Committee and the printing and distribution of the report by the United States Printing Office. The plaintiffs attempted to enjoin the distribution of the report because it contained, they asserted, defamatory and objectionable material. The District Court and a divided United States Court of Appeals for the District of Columbia held that there was absolute immunity. While the Supreme Court held Congressmen immune from liability for actions in the legislative sphere,nevertheless the Court in Doe v McMillan stated at p. 313:

"Our cases make perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause."

For example, the Court noted that Congressional attempts to influence the Executive Branch is not protected activity at p. 313:

"Nor does the Speech and Debate Clause protect a private republication of documents introduced and made public at a committee hearing, although the hearing was unquestionably part of the legislative process." (at p. 313-314)

While public dissemination may serve a legislative purpose such as informing the public, it is not protected speech, (at p. 314).

The Court further stated on p. 315:

"Members of Congress are themselves immune for ordering or voting for publication going beyond the reasonable requirements of the legislative function, Kilbourn v. Thomson supra but the Speech or Debate Clause no more insulates legislative functionaries carrying out such nonlegislative directives than it protected the Sergeant at Arms in Kilbourn v Thompson when, at the direction of the House, he made an arrest that the courts subsequently found to be "without authority."

Therefore, in this case at bar, even if there is some immunity, it is clear that those carrying out the order to distribute the harmful press releases or those unlawfully prosecuting the plaintiffs ANE and ANE Inc., are not immune from liability.

The Court at p. 316 further said that:

"Thus, we cannot accept the proposition that in order to perform its legislative function, Congress not only must at times consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to private reputation that material might be."

If Congress, with Constitutional protection, cannot disseminate actionable material without liability, how possibly can the defendants in this case be immune to suit for release of actionable information?

The Court clearly said again in discussing Barr v. Matteo that it "... confers immunity on government officials of suitable rank..." for limited purposes (Doe at p. 319). So can it reasonably be contended that all defendants here are of suitable rank and authority as to be immune from suit?

The Court also stated that it wrote in the shadow of two recent cases "... where the Court advised caution (w)here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him..." (at p. 324 citing Wisconsin v. Constantineau 400 U.S. 433 (1971) and Board of Regents of State Colleges v. Roth 408 U.S. 564 (1972).

In summation, the doctrine of official immunity is much more complex than the Opinion suggests. It is not authomatic for all government officials. The scope must be determined at a trial where the facts of one's authority are balanced against one's acts. In fact, even Congressmen and high ranking heads of departments may be held for libelous activity. In this case at bar, where no libel is alleged, where there has been little if any discretionary activity, a simple blanket immunity cannot be alleged.

5. Discretionary Function Exception

While basically there is tort liability for the acts of the government, many early cases have held thereis a discretionary function exception for officials making general policy. The purpose of that exception is to allow those officials to deliberate on general policy matters without fear of the consequences of their final policy pronouncements. The mere fact that some discretion is used will not give rise to exception from liability. For in all aspects of business, government, etc. there is some discretion in every act. Discretionary acts are terms of art, defined by law, in particular factual circumstances. Thus, government decisions about plans, designs, and

specifications are not discretionary acts, Seaboard Coast Line R. Co. v. U.S. (CA Ala. 1973) 473 F. 2d 714. If the government employees are under a duty imposed by law to perform a mandatory act there is surely no discretionary function exception from liability, Nelms v. Laird (CA N.C. 1971) 442 F. 2d 1163, reversed on other grounds 406 U.S. 797. The mere fact that the judgments of government employees require expert consultation does not mean they fall under the discretionary function exception from liability, Hendry v. U.S. (CA N.Y. 1969) 418 F. 2d 774. The mere fact that some decision making power is exercised by the government does not give rise to the exception from liability for discretionary acts, Smith v. U.S. (CA Ga. 1967) 375 F. 2d; cert. denied 389 U.S. 841. As stated in Moyer v. U.S. (D.C. Fla. 1969) 302 F. Supp. 1235; reversed on other grounds 481 F. 2d 585, a key question as to whether acts fall within the discretionary function exception is whether the acts occurred at the planning level or the operational level. In this case at bar, it would seem most unlikely that any of the acts performed by the defendants occurred at the planning level but this can only be determined after trial of these facts. Therefore the mere raising of the discretionary function exception is probably inappropriate. The discretionary function exception can also be waived and in this case by Answer to the original Complaint, which was based upon the same operative facts, the defendants have waived their rights. But in any event, the discretionary function exception is merely available as a defense and as noted supra, must be proved in each specific case.

6. Lack of Notice

As we have already noted above, the defendants in the prior action against the plaintiffs admitted that if there had been notice to ANE, the

so called problems might well have been corrected. They, however, argued in the District Court that where willfulness is charged, no notice need be given. If they have publicly admitted themselves that corrective action would be taken by the plaintiffs if put on notice - how can they at the same time argue willfulness. The Court of Appeals' decision in the prior case clearly illustrated this point.

The Opinion does state that: "Since the Secretary evaluated evidence against plaintiffs and exercised his judgment prior to proceeding against them, there can be no doubt that his decision was discretionary and entitled to immunity."

The question here is much more complicated than that described by the Opinion. In the first place, neither the plaintiffs nor the Court knows what the Secretary did do and what he did not do; that will only be learned at trial. Secondly, even if the Secretary is immune from suit, which we doubt, his employees may not be immune. Thirdly, the case here turns not merely upon a decision to prosecute. The employees of the Department of Agriculture admitted in open Court that if the plaintiffs in this suit had been informed of the matter they were charged with in the original action, they would have been corrected then. Yet they gave these plaintiffs no notice and charged them with willful violation. Is that discretionary or is that deliberate malicious conduct on the part of said officials?

Such interpretation and holding said action discretionary would render the notice provision of CEA Rule 0.3 (c), totally meaningless, since at will, all parties could be charged with willful violations and denied notice. To think that careless, negligent, malicious or other wrongful or capricious finding of willfulness is a discretionary act in the legal sense of giving rise to immunity is something a court will have to decide. It is

submitted,however, that such interpretation is not at all in keeping with the present state of the law. Deliberate wrongful administration of an existing statute, is not the type of discretion that gives rise to immunity under the law in this area. In any event, the defendants will have to assert their defense and prove it and that can only be done at trial and not by motion without evidence.

7. Resignation of the Corporation from Licensed Activities

On page 5 of the Opinion, the Court states that administrative proceedings can be continued despite the withdrawal of the registrants from jurisdiction. The case cited is one that is not directly applicable to the CEA and the plaintiffs herein.

In addition, however, can, as was done to the plaintiffs herein, parties who are no longer registered, be suspended from registration. We have argued below that such a result is contrary to logic and law, and so it would seem.

8. Sovereign Immunity

The Opinion below at page 2 asserts that: "Since it is undisputed that congress has not authorized wither agency to be sued, we dismiss the complaint as to them." There is some question as to the immunity of federal agencies to suit. It is not, however, admitted that they are immune to suit. If indeed, after the proper facts have been presented, it is determined that the proper party should be the United States Government, rather than the agencies involved, then the proper action would be to grant leave to amend the complaint. There is no point in starting a new suit for the courts purpose is not and should not be to engender litigation, based on the same cause of action, where either the agencies of the government or the government itself must be liable, as are the ooficials of that agency.

9. Notice of the District Court's Decision

The District Court, instead of regarding the defendant's motion to dismiss as one whereby it must be presumed the allegations of the plaintiff are all true, to the contrary, seemed to speak from the point of view that all the defendant's assertions are valid. Certainly a motion to dismiss at this stage in the proceedings must proceed from the point of view that the plaintiffs are correct about their factual allegations.

The Supreme Court in the Kent State case decided in April, 1974, that there was no blanket immunity for state officials and that the scope of qualified immunity must relate "... to facts as yet not established either by affidavits, admissions on a trial record. Final presentation of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government...." Scheur v. Rhodes 416 U.S. 232 (1974) at page 243.

The District Court decision has not considered the need to make this analysis required by the Supreme Court on the basis of a factual examination of the circumstances which can only be adduced at trial.

CONCLUSION

This belated motion of the defendants to dismiss based upon official and sovereign immunity is truly without merit. The Opinion below fails to adequately come to grips with the law. It posits a blanket immunity for government officials and entities

under all circumstances. It matters not whether Constitutional rights or private rights are violated, whether there is malice, caprice, negligence, invasion of privacy, taking of property, falsification of figures, all, are protected by the blanket immunity of officials and sovereigns. No matter what harm officials and the government visits upon a citizen, the government and officials are free to act as they please, and the individual has no recourse.

This Opinion is of course repugnant to our form of government and to the actual legal system within which we live. There are indeed limitations upon governmental activity and the citizen does have recourse to demand redress. The Constitution and the Supreme Court have all granted the private citizen redress for wrongs suffered by them, as a result of official acts. Indeed, policy making officials, when acting in their capacity as policy making officials, viz making policy, do have certain immunities. But those limited immunities must be asserted as defenses and proven in court, and balanced against the rights of citizens.

Obviously, even if acting within authority, no official can protect the government from suit if the powers and manner exercised are constitutionally void, Dugan v Rank 372 U.S. 609 (1962). Note also that a renowned author has said:

"In the absence of clear statutory authority, an officer should be deemed without authority to commit a trespass or any other tort." 3 Davis Administrative Law Treatise Sec. 27.10. The Opinion below misconstrues the term discretionary functions. The mere fact that some decision making authority was exercised is insufficient defense for the defendants, Smith v. U.S. 375 F. 2d 243 (1967) cert. denied 389 U.S. 841.

In summation, this matter should proceed to trial. Interrogatories have already been served on the defendants. The plaintiffs are ready with other discovery devices. The responses to these discovery devices will help to determine if anyone at all can raise the defense of official immunity. It would seem most unlikely that other than ministerial acts were involved in this case, but that can be determined only after discovery and trial. In view of the lateness of this motion by the defendants, the plaintiffs respectfully request that the Opinion be reversed and if possible, a ruling be made forthwith, requiring that the written interrogatories be answered within five (5) days from the decision.

Respectfully submitted,

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Dated: New York, New York
August 22, 1975

B

Economou file

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR N. ECONOMOU et al.,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF AGRICULTURE et al.,

Defendants.

72 Civ. 478

MEMORANDUM

#42465

A

MacMAHON, District Judge.

Defendants move, pursuant to Rule 12(b), Fed. R.Civ.P., to dismiss the second amended complaint on the ground that it is barred as to the governmental agencies by the doctrine of sovereign immunity and as to the individual governmental employees by the doctrine of official immunity.

At first blush, plaintiffs' lengthy second amended complaint appears to allege ten "causes of action." Upon close examination of the second amended

"A"

complaint, however, we conclude that it only makes three claims that defendants deprived plaintiffs Arthur N. Economou (ANE) and Arthur N. Economou & Co., Inc. (ANE, Inc.)[1] of their constitutional rights: (1) defendants' decision to initiate disciplinary proceedings against plaintiffs under § 9 of the Commodity Exchange Act (Act) without first issuing a warning letter; (2) defendants' decision to continue disciplinary proceedings against plaintiffs even though they were no longer in business as futures commission merchants under the Act; and (3) defendants' issuance of inaccurate press releases concerning plaintiffs.

The defendants, the United States Department of Agriculture and the Commodity Exchange Authority, as agencies of the United States, can invoke the doctrine of sovereign immunity as a bar to suit unless congress has authorized them to be used in their own name.[2] Since it is undisputed that congress has not authorized either agency to be sued, we dismiss the complaint as to them.

The individual defendants, all officials of the United States Department of Agriculture or the Commodity Exchange Authority, contend that they are protected from suit by the doctrine of official immunity. In order to establish this defense, defendants must show

that their alleged unconstitutional acts were within the outer perimeter of their authority and discretionary.[3]

Defendants can establish that their acts were within the outer perimeter of their authority if they can show that the acts had more or less connection with the general matters committed by law to their control or supervision.[4]

The initiation and maintenance of disciplinary proceedings against commodity traders for violations of the Act and the issuance of press releases concerning such violations, defendants' alleged unconstitutional acts, were committed to defendants' control by §§ 9 and 12 of the Act. Moreover, plaintiffs admit in their second amended complaint that defendants' acts were connected to their duties under the Act. We conclude, therefore, that the individual defendants' acts were well within the scope of their authority.

Once defendants have established that their acts were authorized, they can qualify for official immunity by showing that the acts involved the exercise of discretion.[5] Authorized acts of discretion by governmental officials are immunized from suit so that such

officials can make decisions while performing their duties "without fear or threat of vexatious or fictitious suits or personal liability."[6]

We turn to an examination of each act of defendants alleged to be unconstitutional in light of these principles of law to determine if the act was discretionary and, therefore, warrants immunity.

Plaintiffs contend that defendants' decision to initiate disciplinary proceedings against them for violations of the Act without first issuing a warning letter was an unconstitutional ministerial act not entitled to immunity.

The undisputed facts are that the Secretary of Agriculture, after examining a Commodity Exchange Authority audit of ANE, Inc., exercised his judgment and concluded that plaintiffs had wilfully violated the Act. He, therefore, took immediate action against plaintiffs without first issuing a warning letter.

The Secretary, in deciding whether to initiate proceedings against plaintiffs, was in a position analogous to that of a prosecutor in deciding whether

to bring criminal proceedings against a defendant. Courts have uniformly held that the decision whether to prosecute a defendant is discretionary because it involves the evaluation of evidence and the exercise of judgment.[7] Since the Secretary evaluated the evidence against plaintiffs and exercised his judgment prior to proceeding against them, there can be no doubt that his decision was discretionary and entitled to immunity.[8]

Plaintiffs next contend that defendants' decision to continue disciplinary proceedings against them after they had withdrawn from doing business as futures commission merchants under the Act was a ministerial act which deprived plaintiffs of their constitutional rights. Defendants contend that they interpreted the Act to require them to complete proceedings against plaintiffs in order to prevent them from obtaining a new license in the future.

In an analogous situation, it has been held that, even though a securities broker-dealer had withdrawn from doing business under the securities laws, the SEC's decision to bring public proceedings against it was a discretionary act involving the SEC's interpretation of the securities laws which it was charged with enforcing and would not be upset by the court.[9]

Since defendants' decision to continue with the proceedings involved discretionary interpretation of the Act which they were charged with enforcing, the decision is entitled to immunity.

The third act by defendants which plaintiffs claim is ministerial is the issuance of several press releases allegedly containing false and misleading information about plaintiffs while defendants were proceeding against them under the Act. The issuance of press releases by governmental officials concerning administrative enforcement proceedings is a discretionary act entitled to immunity.[10]

Since the individual defendants have shown that their alleged unconstitutional acts were both within the scope of their authority and discretionary, we dismiss the second amended complaint as to them.

Accordingly, we grant defendants' motion, pursuant to Rule 12(b), Fed.R.Civ.P., to dismiss the second amended complaint as to all defendants. SO ORDERED.

Dated: New York, N. Y.
May 22, 1975

Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

FOOTNOTES

1 In the second amended complaint, American Board of Trade, Inc. (AMT, Inc.) appears as a plaintiff. The only reference to this plaintiff is in paragraphs 25 and 26 of the second amended complaint, wherein it is alleged that defendants' acts vis-a-vis plaintiffs ANE and ANE, Inc. caused AMT, Inc. emotional burdens and resulted in trespass on its land. These vague and conclusory allegations completely fail to establish a causal link between defendants' acts and the alleged harm to AMT, Inc. We, therefore, grant defendants' Rule 12(b) motion as to AMT, Inc. and reference to "plaintiffs" in the text will mean ANE and ANE, Inc. only.

2 Blackmar v. Guerre, 342 U.S. 512 (1952).

3 Barr v. Matteo, 360 U.S. 564 (1959).

4 Spalding v. Vilas, 161 U.S. 483 (1896). See also Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972).

5 Barr v. Matteo, supra.

6 Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655, 659 (2d Cir. 1962), cert. denied, 374 U.S. 827 (1963).

7 Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973).

8 The court, in Economou v. U.S. Dep't of Agriculture, 494 F.2d 519 (2d Cir. 1974), held that the Secretary of Agriculture should have issued a warning letter to plaintiffs ANE and ANE, Inc. before filing a complaint against them because his conclusion that plaintiffs had wilfully violated the Act was not warranted from the record as a whole. We have held that the Secretary's decision not to issue a warning letter was within the scope of his authority and discretionary. As such, it is still entitled to immunity even though it has been held to be incorrect. Boruski v. Stewart, 381 F. Supp. 529 (S.D.N.Y. 1974).

9 M.G. Davis & Co. v. Cohen, 369 F.2d 360 (2d Cir. 1966).

10 Barr v. Matteo, supra; Federal Trade Comm'n v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968).

MPB:n
72-0398

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ARTHUR N. ECONOMOU, et al.,

Plaintiffs,

-v-

UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,

Defendants.

NOTICE OF MOTION TO DISMISS SECOND AMENDED COMPLAINT

72 Civ. 478 (LFM)

----------x

S I R :

PLEASE TAKE NOTICE that upon the memorandum of law and the opinion of the judicial officer of the United States Department of Agriculture submitted herewith, and upon all prior proceedings and papers filed herein, the defendants will move pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing the second amended complaint on the ground that as to the individual defendants it is barred by the doctrine of official immunity and as to the government agency defendants it is barred by the doctrine of sovereign immunity, at a motion term to be held before the Honorable Lloyd F. MacMahon, United States District Judge, in the United States Courthouse, Foley Square, New York, New York, on the 4th day of April 1975, or as soon thereafter as counsel may be heard.

You are required to serve your answering papers upon the attorney for the defendants on or before April 2, 1975 at 4:00 P.M..

Dated: New York, New York
March 20, 1975

Yours, etc.,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York,
Attorney for Defendants

MPB:n
72-0398

By: Mel P. Barkan
MEL P. BARKAN
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Telephone No.: (212) 791-0052

TO: DAVID C. BUXBAUM, ESQ.
Attorney for Plaintiffs
Suite 510
111 Broadway
New York, New York 10006

"Exhibit A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Arthur N. Economou
Arthur N. Economou & Co., Inc.
The American Board of Trade, Inc.

Plaintiffs,

v

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture; RICHARD T. LYNG, Assistant Secretary of Agriculture, COMMODITY EXCHANGE AUTHORITY; ALEX C. CALDWELL, Act Administrator, Commodity Exchange Authority; CHARLES E. ROBINSON, Director, Compliance Division, Commodity Exchange Authority; RICHARD E. KIRCHHOFF, Deputy Director, Registration and Audit Division, Commodity Exchange Authority; JACK W. BAIN, Chief Hearing Examiner, United States Department of Agriculture; RICHARD W. DAVIS, JR., Counsel, United States Department of Agriculture; T. REED McMINN, Regional Administrator, New York Regional Office, Commodity Exchange Authority; CLEMENT GROSS, Auditor, Commodity Exchange Authority; MURRAY A. WOLKIS, Auditor, Commodity Exchange Authority; EDWARD P. FITZPATRICK, Auditor, Commodity Exchange Authority, DONALD A. CAMPBELL, Judicial Officer, United States Department of Agriculture.

Defendants,

CIVIL ACTION NO. 72 Civ. 478

L.F.M.

VERIFIED AMENDED COMPLAINT

1. This proceeding is brought in part pursuant to Section 1331, 2201, 2202 of Title 28 of the United States Code and the relevant provisions of the Federal Tort Claims Act 28 USC 1291 ff; Section 1583 of Title 42 of the United States Code; Section 10 (b) of the Administrative Procedure Act (5 USC 703); and the First and Fifth Amendments of the Constitution of the United States and such other Constitutional and Federal laws as may be relevant he eto.

2. Plaintiffs, The American Board of Trade, Inc. (hereinafter "ABT") and Arthur N. Economou & Co.,Inc. (hereinafter "ANE Inc") are corporations incorporated under the laws of the State of Delaware and having their principa

office and place of business at 286 Fifth Avenue, New York, N.Y.

3. Plaintiff Arthur N. Economou (hereinafter "ANE") is an individual resident of New York, with resident address at 115 E. 87th Street, New York, N.Y.

4. Defendants are the United States Government, its agencies, and employees thereof, some of whom are investigative or law enforcement officers thereof, who, acting in their ministerial capacity, did conspire to interfere with and violate, and did interfere with and violate, Plaintiffs' rights and privileges, and did deprive Plaintiffs of their property without due process of law, in conflict with the laws and Constitution of the United States, as more fully appears hereinbelow.

5. Defendants, Department of Agriculture, acting through the Defendant Commodity Exchange Authority and officers thereof, instituted proceedings against Plaintiffs ANE and ANE Inc. on February 19, 1970, and June 22, 1970, alleging that, as of certain dates, in 1969 and 1970 ANE Inc. failed to meet certain requirements applicable to "futures commission merchants" registered under the Commodity Exchange Act. Some time before the issuance of the February 19 complaint, Plaintiffs ANE and ANE Inc. had ceased to engage in the activities regulated by Defendants, and several weeks prior to such complaint Defendants had confirmed that ANE Inc., then a registrant, was in conformity with all legal requirements. Defendants issued the June 22 amended complaint against ANE and ANE Inc. at a time when they were no longer subject to regulation by Defendants in respect to the acts which they complained. Defendants issued each of the complaints without the notice or warning required by law.

6. Prior to the issuance of Defendants' illegal complaints and throughout their improper proceedings against ANE and ANE Inc., Plaintiffs and their affiliates were sharply critical of the staff and operations of Defendants and carried on a vociferous campaign for the reform of Defendant Commodity Exchange Authority to obtain more effective regulation of commodity trading.

Federal Rules of Appellate Procedure, to recover the costs they incurred in connection with their defense of the unlawful complaints, has been denied by the Court of Appeals for the Second Circuit, so that out-of-pocket costs in the aggregate amount of approximately $30,000 which such Plaintiffs expended in their defense have not been recovered by them.

FOR A FIRST CAUSE OF ACTION

13. By bringing unauthorized proceedings against Plaintiffs ANE and ANE Inc. without notice or warning as required by law, Defendants violated the rights and privileges of the Plaintiffs under law and the United States Constitution, including their rights to due process of law.

14. By bringing unauthorized proceedings against the Plaintiffs ANE and ANE Inc., when they knew said Plaintiffs were leaving their jurisdiction, Defendants, in excess of their lawful authority, violated the rights and privileges of the Plaintiffs under law and the United States Constitution.

15. By bringing unauthorized proceedings against the Plaintiffs ANE and ANE Inc. when Plaintiffs were no longer subject to their jurisdiction, Defendants, in excess of their discretionary powers, violated the rights and privileges of the Plaintiffs under law and the United States Constitution.

16. By these unauthorized actions outside their discretionary functions and duties, Defendants sought to supress legitimate business activities of the Plaintiffs directly or indirectly that Congress did not give them authority to regulate, punish the Plaintiffs and accomplish the ruin of their business reputation, through harassing them, causing them to expend large amounts of time and money and publicizing the illegal complaint and order and issuing press releases that were not accurate.

FOR A SECOND CAUSE OF ACTION

17. The Defendants, in excess of their regulatory authority and their discretionary functions and powers, did issue administrative orders, illegal and punitive in nature, against the Plaintiffs after Plaintiffs ANE and ANE Inc.

7. Defendants furnished the complaints to interested persons and others without furnishing Plaintiffs' ANE and ANE Inc. answers as well, and the New York office of the Defendant CEA failed to include such answers and other papers in the record in its file made available to the public.

8. Following the issuance of the amended complaint, Defendants issued a deceptive press release that falsely indicated to the public that Plaintiffs' ANE and ANE Inc. financial resources had deteriorated, when Defendants knew that their statement was untrue and so acknowledge previously that said assertion was untrue.

9. On January 8, 1973, Defendant Donald A. Campbell issued a final Decision and Order adopting verbatim the sanctions recommended by Defendant Bain and the complaints in the original action against the Plaintiffs herein. Though Plaintiffs had not for some years either been registered as futures commission merchants or otherwise subject to Defendants' regulatory authority, Defendants suspended ANE Inc.'s "registration", required ANE and ANE Inc. to cease and desist from violating requirements applicable only to registrants and denied them trading privileges on contract market for 90 days.

10. In the petition for review of Defendants' Decision and Order brought by ANE and ANE Inc., Arthur N. Economou and Arthur N. Economou & Co., Inc. v U.S. Department of Agriculture, Dkt. No.73-1221 (2d Cir. 1974), the Circuit Court of Appeals set aside Defendants' Decision and Order and dismissed their proceedings against ANE and ANE Inc. with prejudice, holding that the prosecution of the complaints was unlawful under federal law.

11. We believe the federal courts decision clearly leads to the conclusion that the actions of Defendants against ANE Inc. and ANE were outside the discretionary functions or duties of Defendants.

12. ANE Inc. and ANE's Motion for Taxation of Costs, pursuant to the

were no longer subject to their authority, deliberately causing the Plaintiffs substantial personal and economic harm, as aforesaid.

FOR A THIRD CAUSE OF ACTION

18. By the aforesaid unauthorized and illegal activities, which caused Plaintiffs to deplete financial and human resources, the Defendants discouraged and chilled the campaign of criticism Plaintiffs ANE and ANE Inc. directed against them, and thereby deprived the Plaintiffs of their rights to free expression guaranteed by the First Amendment of the United States Constitution.

FOR A FOURTH CAUSE OF ACTION

19. By furnishing their complaints to interested persons without furnishing Plaintiffs' ANE and ANE Inc. answers as well and by failing to include Plaintiffs' ANE and ANE Inc. answers and other papers in the file made available to the public by Defendants, Defendants exceeded their authority in violation of Section 9 (a) of the Administrative Procedure Act, 5 USC 558 (b), and, in violation of Plaintiffs' ANE and ANE Inc. rights to due process of law and right to privacy guaranteed by the United States Constitution, sought to subject Plaintiffs' unregulated business affairs to harm, discredit them and interfere with their non-regulated business operations.

FOR A FIFTH CAUSE OF ACTION

20. By issuing a deceptive press release to the media that falsely indicated the Plaintiffs' ANE and ANE Inc.'s financial resources had deteriora when Defendants knew or should have known they did not, Defendants violated Plaintiffs' ANE and ANE Inc's right to due process of law, for the news releas by ministerial officials damaged Plaintiffs' ANE and ANE Inc's credit standing and put pressure on Plaintiffs' staff to counter the false charges to which th release was devoted, and had a serious affect upon the Plaintiffs' public

standing, the willingness of customers to do business with them and the businesses with which they were associated, such as Plaintiff ABT.

FOR A SIXTH CAUSE OF ACTION

21. Those Defendants who were law enforcement and investigative officers, acting in their ministerial capacity did act outside the scope of their authority and abuse legal process by continuing to prosecute unlawfully brought complaints against Plaintiffs ANE and ANE Inc. and demanding sanctions against them when they were no longer under governmental jurisdiction.

FOR A SEVENTH CAUSE OF ACTION

22. Defendants who were law enforcement and investigative officers, acting in their ministerial capacity did act outside the scope of their authority and maliciously prosecute Plaintiffs ANE and ANE Inc. as aforesaid.

FOR AN EIGHTH CAUSE OF ACTION

23. Defendants, by wrongfully causing the publishing of false information about the Plaintiffs ANE and ANE Inc. and wrongfully making public distorted information about the Plaintiffs, did invade the privacy of the Plaintiffs and caused them injury.

FOR A NINTH CAUSE OF ACTION

24. Defendants did negligently and with intent to harm the Plaintiffs, ANE and ANE Inc. publish information about the Plaintiffs causing the Plaintiffs harm.

FOR A TENTH CAUSE OF ACTION

25. Defendants did in excess of their authority upon the facts stated hereinabove, trespass on Plaintiffs ANE, ANE Inc. and ABT property.

26. By reason of all of Defendants' illegal actions, Plaintiffs ANE, ANE Inc. and ABT and their business incurred heavy financial and emotional burdens and were damaged immeasurably, as were all institutions with which the Plaintiffs had a substantial connection.

WHEREFORE, Plaintiff demands:

A. Judgment against the Defendants for the costs and expenses incurred by Plaintiffs ANE and ANE Inc. in defending themselves against the Defendants' illegal activities in the amount of $30,000; and

B. Compensatory damages for injury to the business of the Plaintiffs in the amount of $5,000,000; and

C. Compensatory damages for the interference on the civil rights of the Plaintiffs in the amount of $4,000,000; and

D. Compensatory damages for the invasion of Plaintiffs privacy in the amount of $4,000,000.

E. Compensatory damages for malicious prosecution of Plaintiffs in the amount of $4,500,000.

F. Compensatory damages for abuse of process against the Plaintiffs in the amount of $6,000,000.

G. Compensatory damages for the trespass of the Defendants in the amount of $500,000.

H. Compensatory damages for taking of the property of Plaintiffs in the amount of $8,000,000.

That this court grant such other and further relief as may be just and proper.

Dated: New York, New York

March 6, 1975

David C. Buxbaum
Attorney for Plaintiffs
Suite 510, 111 Broadway
New York, New York 10006
(212) 349-5780

STATE OF NEW YORK)
)ss:
COUNTY OF NEW YORK)

Arthur N. Economou, being first duly sworn deposes and says:

Deponent is an officer of all the Plaintiff corporations in this action and a Plaintiff in this action; Deponent has read the foregoing Amended Verified Complaint and knows the contents thereof; and the same is true to the Deponent's own knowledge, except as to the matters therein stated to be upon information and belief and as to these matters Deponent believes them to be true.

This verification is made by Deponent because Plaintiffs aside from Deponent are corporations and Deponent is an officer of said corporations.

Arthur N. Economou

Arthur N. Economou

Sworn to before me
this 6 March , 1975

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Terry Wang, being first duly sworn, deposes and says:

1. Deponent is not a party to the action.

2. Deponent is over 18 years of age and resides at 235 W. 102nd Street, New York,New York.

3. On August 26, 1975, at One Saint Andrews Plaza, New York, New York, deponent served the within Brief upon Taggard Adams, Esq. U.S. Attorney, the attorney for the defendants herein, by delivering a true copy to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as attorneys for the defendants therein.

Terry Wang

Sworn to before me this
26th day of August, 1975.

DAVID C. BUXBAUM
NOTARY PUBLIC, State of New York
No. 41-0648
Qualified in Kings County
Commission Expires March 30, 19__